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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CDLC CATERING, INC., Plaintiff and Appellant, v. BRUNO BAIO, Defendant and Respondent.	B292657 Los Angeles County Super. Ct. No. BC513748

APPEAL from an order of the Superior Court of Los Angeles County, Gregory W. Alarcon, Judge. Dismissed.

Herbert Abrams for Plaintiff and Appellant.

Matthew Soule for Defendant and Respondent.

INTRODUCTION

Plaintiff and appellant CDLC Catering, Inc. (plaintiff) appeals from an unsigned minute order dismissing the case for failure to bring it to trial within the five-year period provided by Code of Civil Procedure section 583.310.[1] Plaintiff contends the court erred because trial commenced on the last day of the five-year period when plaintiff's trial counsel was sworn as a witness and two exhibits were marked for identification. We dismiss the appeal for lack of an adequate record.

BACKGROUND

On July 1, 2013, plaintiff filed a complaint against defendant and respondent Bruno Baio (defendant) for conversion and breach of fiduciary duty.

In late May 2018, the trial court asked the parties to show cause on July 2, 2018, why the case should not be dismissed for failure to bring it to trial within five years. On June 14, 2018, plaintiff filed an ex parte application to specially set the case for jury trial on June 28, 2018. In its application, plaintiff argued the court should utilize the "charade" of empaneling and then dismissing the jury to avoid dismissing the case under section 583.310. Defendant opposed the application because, among other things, plaintiff had not complied with a prior court order involving outstanding discovery and sanctions. On June 21, 2018, the court denied plaintiff's application "without prejudice to plaintiff bringing an ex parte motion to set this case for an actual

[1] All undesignated statutory references are to the Code of Civil Procedure.

trial (not a sham or a charade) prior to the cut-off date of [July 2, 2018]."

On July 2, 2018, plaintiff filed another ex parte application to specially set the case for jury trial "within the time allowable" under sections 583.310 and 583.340. In this application, plaintiff argued the five-year period to bring a case to trial was "extended" due to the reassignment of one judge and the disqualification of another judge. Once again, defendant opposed plaintiff's application. Defendant argued the application was untimely because it was not filed before July 2 and the case was not at issue. On July 2, 2018, the court continued the order to show cause for dismissal and plaintiff's application to specially set the case for jury trial to July 16, 2018. Plaintiff filed a waiver of jury trial on July 10, 2018.

On July 16, 2018, the court conducted a hearing on the order to show cause and plaintiff's ex parte application to specially set the case for trial. Before resolving these matters, plaintiff's trial counsel—Herbert Abrams—was sworn and testified. The court also marked two exhibits for identification—facsimiles sent by Abrams to an individual named Gerard Soussan.

The court took the matter under submission on July 16, 2018. Later that day, the court issued a minute order resolving the order to show cause and plaintiff's application (hereafter, the minute order). The minute order states the following: "This matter was set for the last day to go to trial. Plaintiff is not ready for trial. The Court orders this case dismissed. [¶] The Judicial Assistant is giving notice via this minute order." The minute order is not signed by the judge nor stamped with a replica of the judge's signature. The only signature that appears on the minute

order is the Judicial Assistant's signature certifying that a copy of the minute order was mailed to counsel.

Plaintiff appeals from the minute order.

DISCUSSION

As a threshold matter, there is some doubt whether we have jurisdiction to review the unsigned minute order dismissing the case. (See *Powell v. County of Orange* (2011) 197 Cal.App.4th 1573, 1578 ["An order that is not signed by the trial court does not qualify as a judgment of dismissal under section 581d."].) Nonetheless, even if we had jurisdiction, we would dismiss the appeal because plaintiff failed to provide us with an adequate record.

Here, plaintiff contends the court erred in dismissing its case because trial commenced when its attorney (Abrams) testified and two exhibits were marked for identification on July 16, 2018—the last day to begin trial under section 583.310. We agree with plaintiff that section 583.310 only requires that the trial begin within the five-year period, not that the trial be completed within that period. (See *In re Marriage of Macfarlane & Lang* (1992) 8 Cal.App.4th 247, 253.) That is, once trial commences, the statute no longer applies. (*Id.* at p. 254.)

But error is never presumed on appeal; instead, the judgment or order is presumed correct. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.) An appellant has the burden of overcoming the presumption by providing an adequate appellate record demonstrating the error. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.) "A necessary corollary to this rule [is] that a record is inadequate, and appellant defaults, if the appellant predicates error only on the part of the record he provides the trial court, but ignores or does not present to the

appellate court portions of the proceedings below which may provide grounds upon which the decision of the trial court could be affirmed." (*Uniroyal Chemical Co. v. American Vanguard Corp.* (1988) 203 Cal.App.3d 285, 302.)

On the incomplete record before us, we cannot evaluate plaintiff's contention that trial commenced on July 16, 2018. Specifically, plaintiff has not provided us with a reporter's transcript or adequate substitute such as a settled or agreed statement concerning what occurred on July 16. Plaintiff also has not provided us with the exhibits that were marked for identification on July 16. And based on the minute order, we are not persuaded that the July 16 proceeding was the functional equivalent of a trial. Although Abrams testified and two exhibits were marked for identification, it appears this evidence was considered by the court to resolve the order to show cause and plaintiff's ex parte application, not to resolve contested factual issues relating to plaintiff's claims for conversion and breach of fiduciary duty. (See *Sagi Plumbing v. Chartered Construction Corp.* (2004) 123 Cal.App.4th 443, 448 ["Trial has commenced within the meaning of the five-year statute if there has been a determination of any contested issue of fact or law that brings the action to the stage where a final disposition can be made."].) Notably, the minute order expressly states that plaintiff "is not ready for trial."

In sum, even if this appeal were properly before us, we would dismiss the appeal because plaintiff failed to provide an adequate record. (See, e.g., *Ehman v. Moore* (1963) 221 Cal.App.2d 460, 463 ["Where the appellant fails to provide the

reviewing court with a record enabling it to review and correct alleged errors, the appeal will be dismissed."].)[2]

DISPOSITION

The appeal is dismissed. Respondent Bruno Baio shall recover his costs on appeal.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

EGERTON, J.

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[2] Plaintiff does not provide any legal authority or reasoned analysis to support its contention that the court also abused its discretion by vacating an earlier trial date. We therefore pass it without further discussion. (See *Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655.)